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Supreme Court of the United States

October Term, 1977
Nos. 76-1234 and 76-1261

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.,
Petitioners,

vs.

BARBARA ROSS, ET AL.,
Respondents,

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.,
Petitioners,

vs.

HILDA ABRAMS, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits.

Brief for Nationwide Tenant Class in Underwood v. Hills, Statewide Tenant Class in Dubose v. Hills, the National Tenants Organization, People United to Save Humanity, and the National Conference of Catholic Charities, as Amici Curiae.

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Interest of Amici Curiae.

The nationwide class of Section 236 tenants in *Underwood v. Hills,*[1] the statewide class of such tenants in Connecticut in *Dubose v. Hills,*[2] the National Ten-

[1] *Underwood v. Hills,* 414 F.Supp. 526 (D.D.C. 1976), *appeal pending* Nos. 76-1603 and 76-1650 (D.C. Cir.), *stay ordered sub nom. Underwood v. Harris,* 429 U.S. 892 (1976).

[2] *Dubose v. Hills,* 405 F.Supp. 1277 (D. Conn. 1975), 420 F.Supp. 399 (D. Conn. 1976), *appeal pending* Nos. 76-6107 and 76-6181 (2d Cir.).

ants Organization, People United to Save Humanity, and the National Conference of Catholic Charities appear as *amici curiae* with the consent of all parties given in letters which have been filed with the Clerk of this Court. The interest of each *amicus* is briefly summarized below.

The class certified by the District Court in *Underwood* consists of all tenants residing in Section 236 projects in the nation—approximately 232,000 families —who the United States Department of Housing and Urban Development (hereinafter referred to as "HUD") estimates are eligible to receive operating subsidies pursuant to 12 U.S.C. §1715z-1(f)(3) and (g). The statewide class of tenants in *Dubose* consists of all low-income people eligible for operating subsidy payments residing in one hundred and one Section 236 projects in Connecticut. The issues raised in both *Underwood* and *Dubose* are identical to those presented in the instant cases—whether the Secretary of HUD is required to implement the operating subsidy program mandated by Congress in 1974.

The District Court in *Dubose* concluded that the tenants would suffer irreparable harm if operating subsidies were not paid since the named plaintiffs would have been required to pay from 52% to 92% of their monthly incomes for rent. The District Court in *Underwood* made a similar finding and concluded that the Secretary's refusal to implement the operating subsidy program would force tenants either to pay increased rents out of funds needed to purchase other basic necessities of life or be evicted from federal housing built for them. 414 F.Supp., at 530-31.

The National Tenants Organization (NTO), a national organization of tenant associations, acts as a

national lobbyist for tenant activities and deals with the issues of rental charges for low-income tenants and the involvement of the federal government in providing adequate, affordable housing for poor people. NTO has been and is committed to the principle that low-income tenants be required to pay no more than 25%-30% of their adjusted income for rent. In view of this commitment it is very interested in the outcome of the instant cases because the operating subsidy program was enacted by Congress to insulate low-income tenants from uncontrollable and skyrocketing increases in property taxes and utilities.

People United to Save Humanity (PUSH) is a national organization formed to advance the rights of minorities and low-income people. In light of its commitment to the preservation of existing subsidized housing for low-income people, PUSH has created Operation PUSH with a national coordinator and housing director. Also, Operation PUSH in 1977 persuaded the Secretary of HUD to institute a national moratorium to prevent foreclosure of federally-assisted multifamily housing projects. Operation PUSH submitted to HUD over 100 remedies for curing mortgage loan defaults and emphasized the immediate need to implement existing Congressionally enacted subsidy programs for low-income tenants. PUSH believes the issue before this Court in the instant cases is critical if rents in federally-assisted housing are to be maintained at levels which poor people can afford and if projects are to be saved from default and foreclosure.

The National Conference of Catholic Charities is an association of several hundred Catholic charitable agencies located in 142 of the 153 Catholic dioceses in the United States. The Conference and its member

agencies have long been concerned with the dislocation of low-income persons, urban renewal, and other similar governmental programs such as the Section 236 program which is the subject of this case.[3]

The amici discussed above have a genuine interest in the implementation of the operating subsidy program designed by Congress to protect low-income tenants from paying exorbitant rents for ever increasing utilities and property taxes and to maintain the fiscal viability of these projects.

Issues to Be Addressed in the Brief Amici Curiae.

The issue raised in *Ross* and *Abrams* is whether the Secretary of the United States Department of Housing and Urban Development (hereinafter "HUD") has the discretion to refuse to implement the operating subsidy program, an integral part of the Section 236 federally subsidized housing program. Operating subsidies were designed by Congress to save the troubled Section 236 housing program by subsidizing increasing costs of property taxes and utilities, thereby keeping rents at a level which low-income tenants could afford and preventing project owners from being forced to default on their mortgages. The Secretary's failure to pay operating subsidies, in direct contravention of Congressional intent, is jeopardizing the fate of Section 236 projects across the country and is causing severe

[3]The Conference has appeared as an amicus in two cases challenging HUD's refusal to pay relocation benefits to eligible tenants pursuant to 42 U.S.C. §4601, *et seq. Moorer v. Department of Housing & Urban Dev.*, 417 F.Supp. 1261 (W.D. Mo. 1976), *aff'd.*, ... F.2d ....., 46 U.S.L.W. 2155 (8th Cir. Sept. 9, 1977), and *Dawson v. U.S. Dept. of Housing & Urban Development*, 428 F.Supp. 328 (N.D. Ga. 1976), *appeal pending*, No. 77-1382 (5th Cir.).

hardship to hundreds of thousands of low-income tenants.

Summary of Argument.

Congress in 1974 enacted the operating subsidy provisions of 12 U.S.C. §1715z-1 to relieve tenants and project owners of Section 236 housing from the burden of skyrocketing costs of utilities and property taxes. The language of the statute and its legislative history make it plain that Congress mandated that this subsidy program be implemented. But the Secretary of HUD refused to pay these subsidies and has continued in her refusal despite reprimands from Congress and despite unanimous judicial rulings that her refusal was unlawful. Finally, in frustration, Congress took the extraordinary step of re-enacting the operating subsidy program in Pub. L. No. 95-128 to reconfirm its intent that the program be mandatory and to compel HUD to immediately pay operating subsidies on behalf of tenants.

Congress is the body entrusted under our Constitution with the authority to enact laws controlling the direction of this country's housing policy. Amici will demonstrate that the Secretary of HUD has, since the creation of the Section 236 program for low-income tenants, sought to thwart the will of Congress, and that Congress has continually rebuked the Secretary and has refused to sanction her attempts to usurp its lawful function.

The Secretary has attempted to justify her position with a variety of excuses, all of them without merit. Her claim that she would prefer another kind of subsidy program cannot justify her failure to comply with Congressional directives, and her plea that she has insufficient contract authority to allow her to implement

the program is unpersuasive. The Secretary can pay operating subsidies directly from the excess rental reserve fund without the use of contract authority. Therefore, that her Section 236 contract authority is limited and that she chooses to allocate that contract authority for other purposes are irrelevant. Even if the Secretary were required to use contract authority to pay operating subsidies, she has abused any discretion she might have by allocating none of her contract authority for that purpose. Instead, she has preferred to continue to construct new projects which are doomed to fail without the subsidies needed to save those projects from default, and to use a substantial portion of her contract authority for subsidies which Congress did not authorize. Operating subsidies would provide substantial benefits to tenants, and would not be difficult to administer. Consequently, the Secretary's failure to implement this subsidy program is unsupportable.

Because of the enactment of Pub. L. No. 95-128, this Court should now dismiss the petitions for review in these two cases as improvidently granted since these cases will now be of no precedential value and no longer present an issue of national housing policy which it is necessary for this Court to resolve.

ARGUMENT.

I.

CONGRESS HAS BEEN STRUGGLING FOR YEARS TO PREVENT HUD FROM USURPING CONTROL OF SECTION 236 HOUSING POLICY.

Congress enacted the Section 236 program in 1968 "to assist families with incomes so low that they could not otherwise decently house themselves. . . ." 12 U.S.C. §1701t. Congress designed that program "[f]or the purpose of reducing rentals for lower income families." 12 U.S.C. §1715z-1(a). Under Section 236, which provides federal subsidies to private landlords to enable them to meet the housing needs of the poor, the Secretary of HUD is authorized to insure mortgages of multi-family housing projects and to make interest reduction subsidy payments to the project owners so that tenants' rents can be reduced accordingly. However, because HUD officials felt that the program was not operating well, in 1973 they suspended Section 236, along with several other housing programs.[4]

Congress' reaction to that suspension was a sharp and emphatic disapproval and a directive to reimplement Section 236. Thus began the running battle between Congress and HUD over which of them would control national housing policy. The Senate Reports which accompanied the 1974 HUD Appropriations Act[5] expressed the Appropriation Committee's dissatisfaction with the Secretary's suspension of Section 236.

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[4]The Secretary's limited discretion to suspend these programs, after a thorough study had shown they were unworkable in operation and unsalvageable, was upheld in *Commonwealth of Pennsylvania v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974).

[5]Pub. L. No. 93-414, 88 Stat. 1095 (1974).

> . . . The Committee is distressed and deeply concerned by the Administration's action to abandon our nation's historic housing program.
>
> . . . .
>
> The Committee feels that the Administration has justified its actions for a variety of unsupported reasons. Among other things, it has claimed that the programs were not achieving the goals set by the Congress, but by no stretch of the imagination is that correct.
>
> . . . .
>
> The Sections 235 and 236 programs suffered from both HUD mismanagement, and actual corruption, rather than from any inherent defects in the programs. In cities with good HUD management, such as Milwaukee, the program was a great success. In cities with rampant corruption among housing officials, it, along with other HUD programs, failed. But the failures in certain cities were not peculiar to Sections 235 and 236 and, in fact, these programs were not the main ones affected or which failed, contrary to the opinion of the Department and some judicial mistakes of fact.[6] The Department blamed the programs instead of its own mismanagement. As a consequence of this mismanagement, over 400 indictments have been handed down in housing fraud cases. S. Rep. No. 93-1091, 93rd Cong. 2d Sess. 6-7 (1974). The same statement is also found in

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[6]Presumably this reference to "judicial mistakes of fact" reflects disagreement with the Court's conclusions, in *Commonwealth of Pennsylvania v. Lynn, supra,* that the Section 236 program was unworkable in operation and unsalvageable even with modifications.

S. Rep. No. 93-1056, 93rd Cong. 2d Sess. 6-7 (1974).

Obviously, then, Congress disagreed with HUD's conclusion that the Section 236 program should be suspended, and to force its reimplementation Congress adopted the Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974), which extended the life of the Section 236 program for two years.[7] At the same time, recognizing that there were deficiencies in the existing 236 program, Congress enacted the operating subsidy provisions of Section 236 in 12 U.S.C. §1715z-1(f)(3) and (g), providing subsidies to offset increases in costs of property taxes and utilities. Congress created these subsidies to alleviate the burden of excessive rents imposed on tenants.[8] In the 1974 amendments to Section 236, Congress also provided for "deep subsidies".[9] The purposes of both the deep subsidy and operating subsidy programs are similar —to reduce rents to qualified tenants and provide for an economic mix within each Section 236 project without threatening the solvency or effective management of these projects.[10]

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[7]Congress has continued to extend the Section 236 program, to September 30, 1977 in Section 4(a) of Pub. L. No. 94-375, 90 Stat. 1067 (1976), and to September 30, 1978 in Section 301(e) of Pub. L. No. 95-128 (1977).

[8]S. Rep. No. 93-693, 93rd Cong. 2d Sess. (1974); rptd. at 3 U.S. Code, Cong. & Admin. News 4273 (1974).

[9]Pub. L. No. 93-383, 88 Stat. 633 (1974), 12 U.S.C. §1715z-1(f)(2).

[10]The Senate Report accompanying the Housing and Community Development Act of 1974 and introducing these changes to the Section 236 program noted that:

> This program appears as Section 502 of the proposed Act and grows out of the existing rental housing as-

(This footnote is continued on next page)

The Secretary responded to the passage of the Housing and Community Development Act of 1974 by continuing the Section 236 interest reduction program,[11] but adamantly refused to implement the operating subsidy program. The Secretary has persisted in this refusal despite repeated Congressional reprimands. A strong expression of Congressional disapproval of the Secretary of HUD's handling of the Section 236 program came in 1974 when the Senate Committee on Appropriations imposed financial sanctions on HUD.

> The Committee has concurred with the House in making significant cuts in several of the Department's salary and expense accounts. The Committee believes that too often departmental personnel have been used to obstruct rather than carry out directives of the Congress. Examples are the refusal to fully implement the Section 202 program for the elderly, the inability to come up with regulations for the Section 802 State Housing Finance and Development Agency Program, the failure to deliver the housing goals report on schedule,

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sistance program (section 236 of the National Housing Act). However, while it retains features of existing law, it also contains numerous improvements in that law so as to be, in many ways, a new program rather than a simple continuation of the old. It is believed that these changes—including provisions to promote a mix of families with more widely varying income levels and to prevent excessive rent increases and assist sponsors in meeting increases in operating costs beyond their control—will help eliminate a variety of problems and permit the program to operate more effectively in the future. S. Rep. No. 93-693, 93rd Cong. 2d Sess. (1974); rptd. at 3 U.S. Code, Cong. & Admin. News 4273, 4302 (1974).

[11]However, her efforts on behalf of that program were so minimal that Congress felt compelled to withhold from the Secretary funds for another housing program which she preferred until she used her remaining Section 236 contract authority. H. Rep. No. 93-1139, 93rd Cong. 2d Sess. 7 (1974).

> *the refusal to attempt to meet the housing goals, and the continuing effort to kill the Sections 235 and 236 programs.* S. Rep. No. 94-326, 94th Cong. 1st Sess. 11-12 (1975). (Emphasis added.)

Two years later, HUD and Congress were still at odds, and the Senate Committee on Banking, Housing and Urban Affairs reaffirmed Congressional intent that the Secretary pay operating subsidies.

> The reserve [fund] is required under Section 236 (g) of the Act to be used for additional operating assistance payments under the terms specified in Section 236(f)(3). The Committee is concerned that HUD has not yet implemented this provision of the 1974 Act. S. Rep. No. 94-749, 94th Cong. 2d Sess. 10 (1976).

Still the Secretary did nothing and Congressional discontent flared up again. Senator Sparkman expressed his outrage at HUD's recalcitrance.

> HUD has failed to carry out [the operating subsidy program] despite the specific legislative authority conferred 2 years ago, despite the fact that almost $25 million in excess charges have been returned to HUD, and despite the fact that many projects face financial difficulties and a number have sought remedy under the 1974 provision.
>
> . . . .
>
> Several courts have already stated, in cases brought by owners of troubled projects that HUD is required to utilize the returned funds. There are at the present time several judgments against HUD in cases involving more than 20 projects. HUD, however, persists in litigating rather than in obligating the funds authorized under section 236(g).

122 Cong. Rec. S 10775 (daily ed. June 26, 1976).

At this point Congressional intent to mandate payment of operating subsidies seems clear, and every Court to consider the issue had found the program to be mandatory. The federal judiciary had unanimously and repeatedly ordered the Secretary to pay operating subsidies on behalf of tenants in Section 236 housing.[12]

Even in the face of this unanimous judicial command, HUD continued to refuse to implement the operating subsidy program, and Congress recognized that HUD, despite repeated admonitions from Congress and the courts, would continue to unjustifiably refuse to pay operating subsidies. Congress therefore began debate on new bills, and proposed amendments to them, which would again re-enact the operating subsidy program. That debate reflects the serious distress of the Section

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[12]*See Ross v. Community Services, Inc.*, 396 F.Supp. 278 (D. Md. 1975), 405 F.Supp. 831 (D. Md. 1975), *aff'd.*, mem. 544 F.2d 514 (4th Cir. 1976); *Dubose v. Hills*, 405 F.Supp. 1277 (D. Conn. 1975), 420 F.Supp. 399 (D. Conn. 1976), 434 F.Supp. 227 (D. Conn. 1977), *appeal pending*, Nos. 76-6107 and 76-6181 (2nd Cir.); *Harrison v. Hills*, CV No. 74-938 (W.D. Pa. 1975); *Campbell v. United States Dep't of Housing & Urban Development*, CV No. 75-471 (N.D. Ohio 1975); *Abrams v. Hills*, 415 F.Supp. 550 (C.D. Cal. 1975), *aff'd*, 547 F.2d 1062 (9th Cir. 1976); *Parker Square Tenants Ass'n v. The Dep't of Housing & Urban Development*, CV No. 75CV577-W-3 (W.D. Mo. 1976); *Carberry v. Hills*, CV No. 76-521-F (D. Mass. 1976); *Gertsch v. Hills*, 414 F.Supp. 15 (D. Utah 1976); *Sicuro v. Hills*, 415 F.Supp. 553 (C.D. Cal. 1976), *appeal pending*, No. 76-2872 (9th Cir.); *Battles Farm v. Hills*, 414 F.Supp. 521 (D.D.C. 1976), *appeal pending*, No. 76-1641 (D.C. Cir.); *Underwood v. Hills*, 414 F. Supp. 526 (D.D.C. 1976), *appeal pending*, Nos. 76-1603 and 76-1650 (D.C. Cir.). *See also Dussault v. Hills*, CV No. 76-147 (D.N.H., May 23, 1976); *Gibson v. Harris*, No. 77-0488-R (E.D. Va., Sept. 30, 1977); *Haas v. Harris*, No. 77-0235 (D.R.I., Aug. 11, 1977); *Lefort v. Hills*, No. 76-0286 (D.R.I., Nov. 19, 1976).

236 program caused by HUD's recalcitrance.[13] For example, Representative Hanley highlighted the default rate in Section 236 projects:[14]

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[13]One of a number of bills which was considered was S. 565, introduced by Senator Pearson to "require the payment of operating subsidies." 123 Cong. Rec. S 2054 (daily ed. Feb. 2, 1977). In introducing his bill Senator Pearson described the history to date of Congress' battle with HUD over the operating subsidy program.

> Mr. President, in 1974 the Congress amended the National Housing Act with the intention of securing the long term housing needs of families and elderly in lower-income brackets. A substantial expression of that intention was contained in amendments providing that operating subsidies for section 236 housing projects be made for rent increases resulting from rising utility and tax rates. It is now 1977, and operating subsidies have yet to be paid. And so, Mr. President, I am today offering an amendment that simply seeks to assure that express congressional intention in this area is no longer thwarted.
>
> Mr. President, the Banking, Housing and Urban Affairs Committee was concerned, during consideration of the 1974 amendments, that rapidly rising utility and tax costs might endanger the success of Federal housing projects. The committee rightly feared that after an initial operating expense level was established and rent subsidies set, that there would be no mechanism to adjust the subsidies to meet these rising costs.
>
> The increases would become an evergrowing burden for the tenants, who would then be required, in direct contradiction of the program's goals, to pay much more than 25 percent of their incomes for rent. To avoid this problem the committee proposed, and Congress passed, a provision that authorized the Secretary of the Department of Housing and Urban Development to pay subsidies for those rent increases justified by increased utility and tax rates. But the Department has not authorized such payments except in those instances when tenants have resorted to the courts. *Id.*

[14]Mr. Hanley's figures on the alarming rate of default on Section 236 mortgages confirm earlier findings in HUD's own studies. In 1973, HUD projected that 20% of all Section 236 projects would fail in their first ten years. *Housing In the Seventies,* an October 6, 1973 publication by the Secretary of Housing and Urban Development, at 4-20 and 4-57. A

(This footnote is continued on next page)

> . . . [D]oes anyone know how much we were in the bag for as of September 1976, with the 236 program? We had at that time better than 50,000 units in default, accounting for almost $900 million, in part because HUD has failed to exercise its authority in this matter.
>
> . . . .
>
> Incidentally, this is another interesting factor, HUD this year asked for an increase in its risk insurance up to $1.8 billion. Obviously the antenna is up and it anticipates that we are going to continue to have this kind of default.
>
> . . . .
>
> . . . [A]lready better than 4,000 units have had to be sold at a loss of about $49 million approximately. 123 Cong. Rec. H 4286-87 (daily ed. May 11, 1977).

Senator Brooke also addressed the default rate in Section 236 projects.

> I chaired hearings in Boston on April 18 of this year to hear testimony on the serious problems in HUD-assisted multi-family housing built under the section 221 and section 236 programs.
>
> In Boston alone, there are currently 115 projects built under these two housing programs.
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> . . . .
>
> HUD has already foreclosed or assumed ownership of about 47 of these developments, with over

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1975 HUD study found that foreclosure and sale of subsidized projects were steadily increasing. Between fiscal years 1968 and 1973, 10 projects were sold, in 1974-1975, 77 projects were sold, and for 1976, 609 projects were either in the process of being foreclosed upon or were estimated by HUD to be on the brink of foreclosure. "Multi-family Property Disposition," A Staff Study by the United States Department of Housing and Urban Development, October, 1975, at 1.

> 3,400 housing units. As many as 7,000 tenants in Boston may be faced with substantial rent increases beyond their ability to pay, or be forced to move out of their homes. 123 Cong. Rec. S 9043 (daily ed. June 7, 1977).

And Senator Chafee emphasized the problem of increasing rents in those Section 236 programs which were not being foreclosed on.[15]

> . . . When Congress set this up, Mr. President, it was intended that those tenants in the 236 housing would pay 25 to 30 percent of their adjusted monthly income for rent.
>
> . . . .
>
> What has happened over the past several years is that there have been such increases in local real estate taxes and in energy costs, primarily the cost of fuel oil, that HUD has had to approve rather substantial increases in the rents paid by the tenants in order for the owner of the project to break even.
>
> For example, in my State of Rhode Island, and I suspect this is true elsewhere, some 70 percent of the tenants are paying over 30 percent of their after tax income for rents. 123 Cong. Rec. S 9042 (daily ed. June 7, 1977).

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[15]Again, HUD's own studies show that rental rates are escalating in Section 236 projects. A HUD investigation of a sample of 522 Section 236 projects showed that 81% of the tenants had been paying more than 25% of their incomes for rent. In projects visited in New York and Atlanta, 18% and 20%, respectively, of the tenants in those projects had been paying at least 75% of their incomes for rent. "Section 8 Housing Assistance Payments Programs: The Loan Management Set-Aside," A Field Study by the Department of Housing and Urban Development, January, 1977, at 28 and 37.

Senator Cranston elaborated:

> HUD's failure to implement the section 236 operating subsidy program is jeopardizing the financial stability of the owners of 236 housing and the future tenancy of approximately 232,000 lower-income tenants of these projects who are entitled to these benefits. Without the benefit of the subsidy, many section 236 owners are unable to meet rapidly increasing operating expenses which are beyond their control, and are placed in dire financial straits . . . and the future tenants, on the other hand, are faced with the choice of either vacating the housing or paying rents that far exceed 25 to 30 percent of their income by cutting back on food, medical care, clothing and other necessities of life. It has been reported to me that in California there are section 236 tenants who pay upwards of 90 percent of their income for rent.[16] 123 Cong. Rec. S 9045 (daily ed. June 7, 1977).

Senator Humphrey summarized the plight of tenants and landlords of Section 236 projects as a result of HUD's failure to pay operating subsidies:

> . . . [O]ver these recent years, families have had to devote larger and larger proportions of their family income to basic shelter costs. At some of these projects families are spending 35, 40, and 50 percent of their monthly disposable income for rent. Even these amounts, these rents, in project after project, have become inadequate not only

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[16]Senator Kennedy expressed agreement: "We know that many tenants in section 236 projects are paying as much as 90 percent of their adjusted income for rents. These tenants desperately need help." 123 Cong. Rec. S. 9046 (daily ed. June 7, 1977).

> for making mortgage payments, but for assuring proper maintenance. We are thus confronted by a situation in which rents are rising inexorably at the same time that services necessarily are declining. Project after project constructed only recently and with the aid of our section 236 program, are slipping into slums. 123 Cong. Rec. S 9045 (daily ed. June 7, 1977).

The debates also show that Congress had intended from the beginning that the operating subsidy program be mandatory and that it be implemented, and resented being required to re-enacted legislation in order to compel the Secretary to pay operating subsidies.

> In 1974, the Congress responded to the growing problems by adopting an operating subsidy for 236 projects. . . .
>
> And after we had done this, we were faced with intransigence by the administration—a stolid and unaccountable refusal to use the program. The result was default after default. . . .
>
> . . . But the problem remains that despite the losses in court, HUD has still not implemented the program. It is time we got some action from HUD with this program. Remarks of Senator Humphrey, 123 Cong. Rec. S 9045-46 (daily ed. June 7, 1977).

Senator Pell continued in the same vein:[17]

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[17]*See also* the statements of Senator Chafee: "The act presently provides that they should do it, and HUD has refused to do it", and the remarks of Senator Cranston: "Congress in 1974 enacted the Section 236 operating subsidy provision. . . . Despite compelling indications that Congress intended that the operating subsidy program be implemented, the former Secretary of HUD refused to pay such subsidies except when required to so do by court order." 123 Cong. Rec. S 9042, 9045 (daily ed. June 7, 1977).

> I believe the time has come for the Senate to reconfirm its intent that HUD activate this program.
>
> Mr. President, when Congress passed the operating subsidy program in 1974 it was clear that HUD was mandated to provide operating subsidy funds for Section 236 housing projects experiencing substantial cost escalations. . . . I believe this amendment should clear the air at long last concerning the intent of Congress on this issue. 123 Cong. Rec. S 9046 (daily ed. June 7, 1977).[18]

The bills passed by the House and Senate were submitted to a Conference Committee for reconciliation and on September 26, 1977 the Conferees reported out H.R. 6655, which amended the language of Section 236 [12 U.S.C. §1715z-1(f)(3)] from "the Secretary is authorized to make, and contract to make, additional assistance payments. . . ." to "The Secretary is authorized to make, and *shall* contract to make. . . ." 123 Cong. Rec. H 10103 (daily ed. Sept. 26, 1977). (Emphasis added).

These amendments were the culmination of Congressional efforts to force the Secretary to implement the program it had mandated three years before, and they make it indisputable that operating subsidies are man-

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[18]The Representatives and Senators who made the quoted statements were well informed about the intent of Congress in passing the operating subsidy provisions of the Housing and Community Development Act of 1974. Three of the Senators —Proxmire, Cranston, and Brooke—were conferees for the 1974 Act and one was the ranking member of the 1974 Senate Subcommittee on Housing and Urban Affairs. That their views are entitled to great weight is without question. *See United States v. United Mine Workers of America,* 330 U.S. 258, 281 (1947).

datory. The Conferees stated that they intended by these amendments to "direct the Secretary to make additional Section 236 operating subsidy payments." 123 Cong. Rec. H 10114 (daily ed. Sept. 26, 1977). The bill was signed into law by President Carter on October 12, 1977, as Pub. L. No. 95-128.

As this history demonstrates, Congress has repeatedly demanded that operating subsidies be paid and it is therefore the duty of the executive branch to comply.[19] It is fundamental that only the Congress has the power to make laws. ". . . The Constitution [does] not subject [the] lawmaking power of Congress to presidential . . . supervision or control. . . . The Founders of this Nation entrusted the lawmaking power to the Congress alone. . . ." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 588-89 (1952). And once Congress has enacted a law the executive branch has no constitutional authority to refuse to execute it. "To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution is a novel construction of the Constitution and entirely inadmissible." *Kendall v. United States ex rel. Stokes,* 37 U.S. (12 Pet.) 522, 611 (1838).

The Secretary's refusal to pay operating subsidies is, in effect, an executive branch veto of a statute duly enacted by the Congress and signed into law by the President. It is completely inappropriate under our system of government that this kind of back-handed executive veto take place. Article I, Section VII of

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[19]"[Our Constitution] does most clearly . . . state that laws, good or bad, be enacted by the congress and enforced by the President." *Guadamuz v. Ash,* 368 F.Supp. 1233, 1243 (D.D.C. 1973).

the Constitution of the United States provides that following passage of a bill by both Houses of Congress, it shall be presented to the President. If the President approves it he shall sign it, but if not he shall return it to the Congress, with his objections. There is no other constitutional mechanism by which an executive veto can occur. *People ex rel. Bakalis v. Weinberger,* 368 F.Supp. 721, 726 (N.D. Ill. 1973).

It is no longer possible for the Secretary of HUD to argue that Congress granted her discretion to refuse to implement the operating subsidy program. The Congress intended that this program be mandatory when it first enacted the statute and has tried repeatedly over the years to compel HUD to comply with its directives. It is time for this Court to come to the aid of Congress and refuse to allow the Secretary of HUD to continue to thwart the will of Congress and deny to low-income tenants and project owners the operating subsidies which they so desperately need.

II.

THE SECRETARY OF HUD'S REFUSAL TO PAY OPERATING SUBSIDIES IS UNJUSTIFIABLE.

A. The Secretary's Initial Excuses Are Unsound.

In support of her refusal to implement the operating subsidy program, the Secretary initially relied primarily on two arguments set forth in affidavits filed with the Courts below, J.A. 32-48 and 156-162. She asserted first that she could not pay operating subsidies because she needed additional contract authority in order to spend the excess rental reserve fund. Second, she said that she chose not to pay those subsidies because she believed that they were inequitable since they only assisted Section 236 projects.

1. The Reserve Fund Is Immediately Available and Must Be Used to Pay Operating Subsidies.

Section 236 provides that the excess rental reserve fund is "to be used by the Secretary to make" operating subsidy payments. 12 U.S.C. §1715z-1(g). However, the Secretary has persistently argued that direct payments cannot be made from the reserve fund but that the fund can be used only to liquidate contracts. This argument has been rejected by every court to consider it[20] for the many reasons set forth in the brief of respondent low-income tenants. The Secretary's persistence in arguing that she is powerless to spend the reserve fund without contract authority is symptomatic of her adamant refusal to carry out the will of the legislature. The federal judiciary has unanimously rejected the Secretary's contention and the judgments of these courts have been validated by Congress. Congress never intended the use of the reserve fund to be so limited and HUD's recalcitrance has forced Congress to recently reiterate its position. The Committee of Conference,[21] reporting out the Housing and

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[20]*See, e.g., Dubose v. Hills, supra,* 405 F.Supp., at 1288-1292; 420 F.Supp. at 401-402; *Ross v. Community Services, Inc.,* 396 F.Supp. at 287; 405 F.Supp., at 835-836, *aff'd mem.,* 544 F.2d 514 (4th Cir. 1976) (per curiam); *Underwood v. Hills, supra,* 414 F.Supp., at 531; *Battles Farm Co. v. Hills, supra,* 414 F.Supp., at 526; *Abrams v. Hills, supra,* 415 F.Supp. at 553, *aff'd, supra,* 547 F.2d, at 1068-1069, 1071.

[21]Resort to legislative history to determine Congressional intent is appropriate even if a statute, such as Pub.L.No. 95-128, is clear on its face:

> [W]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination".
>
> *United States v. American Trucking Assns.,* 310 U.S. 534, 543-44 (1940) (footnotes omitted), *quoted with approval in Train v. Colorado Public Interest Research Group. Inc.,* 426 U.S. 1, 96 S.Ct. 1938, 1942 (1976).

Community Development Act of 1977, Pub. L. No. 95-128, which *inter alia* re-enacted the mandatory operating subsidy program, stated:

> The conferees are further aware that HUD has asserted in litigation that it does not have sufficient contract authority to make such payments to the full extent of monies in the reserve fund. These amendments are intended to clarify that while the Secretary is authorized to enter into contracts with project owners to make such payments, *no contract authority is needed to spend the reserve funds for operating subsidies.* 123 Cong. Rec. H 10114 (daily ed. Sept. 26, 1977). (Emphasis added.)[22]

The Secretary claims that because the amount in the reserve fund is limited and will fluctuate, Congress could not have intended that fund to be used to implement the operating subsidy program. Petitioners' Brief, at 15-16. But the Secretary is simply wrong about that. The recent amendments to the Section 236 program in Pub. L. No. 95-128 make it indisputable that Congress has required that the reserve fund be

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[22]Pub. L. No. 94-378, 90 Stat. 1095 (1976), does not support the Secretary's contention that the reserve fund must be used to liquidate contracts. Petitioners' Brief, at 17, *et seq.* That statute did not specify that the fund could only be so used. Congress simply made any excess monies in the reserve fund, after operating subsidies had been paid, available to liquidate contracts for a number of additional housing programs. *See Dubose v. Hills, supra,* 420 F.Supp. 399, 403 (D. Conn. 1976); *Abrams v. Hills, supra,* 547 F.2d 1062, 1071-72 (9th Cir. 1976). In any event, any support for the Secretary's claim that she might once have derived from Pub. L. No. 94-378 has been eliminated by the Committee of Conference's explicit statement quoted above that contract authority is not needed to spend the reserve fund for operating subsidies.

spent for operating subsidies.[23] And, in fact, the reserve fund contains enough money to pay operating subsidies nationwide for at least an entire year. The Secretary admits that in December of 1976 she had $54.4 million in that fund and that it is increasing at the rate of $12 million a year Petitioners' Brief, at 14 n. 15. The accumulation since December would approximately offset the $18 million claim which the Secretary *alleges* exists against that fund. The remaining sum is more than sufficient to pay subsidies nationwide for a full year, since the Secretary estimates that that would require only $43 million. Petitioners' Brief, at 12 n. 13. Moreover, the amendments specifically contemplate that Congress will make future appropriations to provide additional funding for the operating subsidy program, since Congress amended Section 236(f)(3) to require that the Secretary make operating subsidy payments "to the extent of the moneys in the reserve fund established under subsection (g) and to the further extent of funds authorized in appropriation Acts. . . ." Pub. L. No. 95-128, Section 206(a).

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[23]Senator Kennedy noted that spending the reserve fund for operating subsidies would provide "a short term partial solution" to the problems facing HUD's subsidized housing programs. 123 Cong. Rec. S 9046 (daily ed. June 7, 1977). Senator Cranston explained further: "HUD admits that there is money available in the reserve fund to make additional assistance payments [operating subsidies] to all section 236 projects nationwide for at least a year . . . While I recognize that Congress and HUD will be working on a long-term and expanded solution to this problem, including the problems of 221(d)(3) projects, certainly relief should be made available to these [section 236] tenants while this process is going on since funds are available specifically for that purpose." 123 Cong. Rec. S 9045 (daily ed. June 7, 1977).

The Secretary's continuing claim that the insufficiency of the reserve fund indicates that Congress did not require the fund to be spent for operating subsidies is further undermined by the fact that the Secretary has taken at least two steps to deplete the fund. First, the Secretary has altered the method by which the excess rentals which make up the fund are collected from Section 236 project owners. On June 6, 1975, a mere two weeks after the Secretary was first ordered to pay operating subsidies in *Ross, supra,* 396 F.Supp. 278, HUD promulgated Transmittal No. 24, which changed the method by which Section 236 project owners are to compute excess rentals to be remitted to the Secretary for deposit into the reserve fund in a manner that diminishes the amount of those contributions. On January 15, 1976, HUD's General Counsel issued an opinion concluding that Transmittal No. 24 should be implemented retroactively to 1968, which HUD estimates would result in the refund of $18 million from the reserve fund to Section 236 project owners.[24]

Second, the Comptroller General of the United States has recently reported to the Congress that HUD is not requiring sufficient contributions into the reserve fund and that HUD had made little progress in collecting the correct rental charges from low-income tenants since HUD was informed of this problem in 1973. The Report concludes that:

> Numerous weaknesses still exist in the way Section 236 project owners carry out their income recertifications. Also, HUD has not effectively moni-

[24]This opinion was issued one month after the initial preliminary injunctions requiring payment of operating subsidies were issued in *Dubose v. Hills,* 405 F.Supp. 1277 (D. Conn. 1975).

> tored income recertifications at projects to insure that they are carried out in conformance with HUD requirements and in a manner which insures that proper rents are charged tenants in the projects and excess rents are remitted to the Federal Government.[25]

These actions and inactions by the Secretary reducing the size of the reserve fund contravene the purposes[26] of the Section 236 program and directly harm low-income tenants.

2. HUD's Policy Distaste for the Operating Subsidy Program Is Irrelevant.

The other reason the Secretary initially gave for refusing to implement the operating subsidy program was that it would only alleviate the problems facing Section 236 projects and, because it did not resolve the difficulties of other subsidized housing programs, she preferred a broader approach to the economic problems affecting subsidized housing. J.A. 43-48. The Secretary, by advancing such an argument, has once again evidenced her intention to usurp Congress' constitutional

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[25]The Report is entitled "Little Accomplishment in Insuring that Proper Rents Are Charged Under the Section 236 Rental Assistance Housing Program." CED-76-146, October 15, 1976, Government Accounting Office, at 16. *See also* 12 U.S.C. §1715z-1(e) and 24 C.F.R. §425.25.

[26]In his Report the Comptroller General also found that many tenants paid less rent than HUD should have required and accordingly that fewer excess rental charges were sent to the Secretary by the project owners. It should also be noted that in September, 1975, HUD promulgated a new regulation raising the income limits for tenants of Section 236 projects as "its solution" to the sharp increase in operating costs. *See* 24 C.F.R. §236.72, 40 Fed. Reg. 52844-45 (1975), cited in *Dubose, supra,* 405 F.Supp., at 1288 n. 52. This "solution" is directly contrary to the purpose of Section 236—to provide decent housing at reduced rentals for low-income families.

authority to determine the course and direction of our nation's housing programs for lower-income families, and to substitute executive power for that of the legislative branch.[27]

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[27]This attempt to substitute HUD's judgment for that of Congress is reflected in the Affidavit of H. R. Crawford, the former Assistant Secretary for Housing Management at HUD, filed below, in which he recites HUD's policy arguments that implementation of the program passed by Congress would be "inequitable" in an attempt to justify HUD's refusal to pay operating subsidies.

. . . .

3. The operating subsidy provisions of Section 212 of the Housing and Community Development Act of 1974 is an attempt by Congress to address the problem of increased operating costs in Section 236 projects by providing additional subsidies to the project owner. However, Section 212 does not authorize additional assistance for HUD assisted multi-family projects insured under other sections of the National Housing Act which face identical problems.

4. Section 212 of the Housing and Community Development Act of 1974 authorizes the payment of operating subsidies to Section 236 project owners only to the extent necessary to maintain the basic rental charges for tenants at levels not in excess of 30 percent of their gross income. Therefore, the benefit of operating subsidies flows only to those Section 236 projects which are occupied by tenants whose basic rental charge exceeds 30 percent of their gross income. There are Section 236 projects in which a majority or all of the tenants occupying its units pay a rental charge which does not exceed 30 percent of their gross income. Consequently, the payment of operating subsidies will have little or no ameliorating effect upon the economic difficulties threatening the owners of a number of Section 236 projects.

5. The payment of operating subsidies solely to Section 236 project owners, therefore, is inequitable in providing relief only to a small proportion of HUD assisted multifamily projects and to an even smaller group of beneficiaries—those owners of Section 236 projects whose tenants have a basic rental charge exceeding 30 percent of gross income. In view of the need for a general multifamily default policy which will address itself to the economic difficulties facing owners and tenants of all HUD

The Secretary should not be allowed to let her policy distaste for the operating subsidy program interfere with her constitutional duty to execute the laws enacted by Congress. If an administrative agency ever has the discretion to refuse to carry out a congressionally enacted program, it is only when the program has been found by careful study, in operation, to be counterproductive and impossible to modify and administer in a way which would fulfill the intent of Congress in enacting that program. *See Commonwealth of Pennsylvania v. Lynn, supra.*[28] In enacting the operating subsidy program Congress intended to assist tenants and projects owners of Section 236 housing, and that is precisely what the program would do if implemented. Payment of operating subsidies would, consistent with Congressional intent, prevent uncontrollable increased operating costs from being passed on

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assisted multifamily projects, the Department is currently considering a number of alternative proposals for solutions that are more comprehensive and more equitable. J.A. 157-158.

[28]In *Lynn,* the Court sustained only the Secretary's "narrow" discretion, 501 F.2d at 862, to suspend housing programs where those "programs have come into conflict with the overall housing policy or the program goals set by Congress, and . . . administrative correctives within [the Secretary's] power to take have not [and] will not resolve the conflict. . . ." 501 F.2d, at 856. At the same time, the Court recognized that the Secretary has no discretion to ignore a duly enacted and funded program "for reasons of policy . . . extrinsic to [its] operation. . . ." 501 F.2d, at 852. The Court upheld the Secretary's suspension of the Section 236 program after the Secretary demonstrated that the program as it was then operated did not benefit, but in fact may have actually harmed, the low-income people Congress had intended to aid by that program. But the discretion recognized in *Lynn* in no way justifies the Secretary's failure to implement the operating subsidy program which would accomplish exactly what Congress intended—to subsidize increasing costs of property taxes and utilities for tenants paying more than 25%-30% of their incomes for rent. It was one thing for the Secretary to stop making commitments to build new housing

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to low-income tenants.[29] Thus the program must be implemented, and the Secretary's dislike of it is irrelevant.

B. The Secretary's Subsequent Excuses Are Also Unpersuasive.

In addition to the two initial reasons which the Secretary gave for her refusal to pay operating subsidies, her counsel have subsequently offered a variety of additional justifications.

1. The Language of the Operating Subsidy Provisions Is Mandatory.

The Secretary has sought to justify her resistance to her mandatory duty to pay operating subsidies by contending that the difference in authorizing language for the deep subsidy and operating subsidy programs indicates that, while the deep subsidy provisions are mandatory, the operating subsidy provisions are discretionary.

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projects that comprehensive studies showed would be doomed to failure. It is quite another to refuse to implement a program that Congress has determined is necessary to save existing housing projects in which vast investments of private and public money have already been made. While the Secretary may discontinue a program which in operation has proven to be counterproductive, she may not refuse to implement an as yet untried program because that refusal can only be based on policy reasons unrelated to problems with the program in operation.

[29]As the District Court concluded in its opinion in *Dubose v. Hills, supra,* one of the earliest, most comprehensive, and well reasoned operating subsidy decisions:

> Congress adopted the "operating subsidy" provisions in response to the serious problem of operating cost increases due to sharp rises in oil prices and local property taxes. The program was designed to assist only "deserving" projects, and their low income residents. HUD cannot now refuse to fund or implement the "operating subsidy" provisions because they only solve the particular problem

The Secretary's contention turns solely upon the difference between the phrase "shall make, and contract to make" in the former's provisions and the phrase "authorized to make, and contract to make" in the operating subsidy provisions. 12 U.S.C. §§1715z-1(f)(2) and (f)(3). However, the language of both provisions is mandatory and the Secretary's focus solely on the words "shall" and "authorized"[30] is too narrow.

> . . . [D]iscerning Congress's intent to bestow or withhold discretion to suspend the programs in their entirety is not a simple matter of tallying the "shalls" and "mays" and finding that the "mays" have it. *Commonwealth of Pennsylvania v. Lynn, supra,* 501 F.2d, at 854.

Even if it were appropriate to tally mays and shalls, the operating subsidy provisions would be mandatory because they direct the Secretary through the use of the word "shall" to take a number of steps prior to actual payment of operating subsidies, steps which serve no purpose unless operating subsidies are paid.[31]

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for which they were designed, or because they only help the particular population for which they were enacted. The "operating subsidy" program does not have a counter-productive impact on our national housing policy merely because it does not solve all the present problems facing HUD's multi-family assistance programs. Surely Congress has the power to solve a specific problem with which it is familiar without running the risk of administrative non-enforcement because it has not gone far enough, or not gone in the direction considered desirable by the administrative branch. 405 F.Supp., at 1290-91. (Footnote omitted.)

[30]Even the word "unauthorized" has been determined to be the language of command. *Sioux Valley Empire Electric Ass'n, Inc. v. Butz,* 367 F.Supp. 686 (D.S.D. 1973), *aff'd,* 504 F.2d 168 (8th Cir. 1974).

[31]Congress created mandatory prerequisites to the payment of operating subsidies—including the establishment of the reserve fund and the setting by the Secretary of initial operating expense levels for Section 236 projects. Compliance with both of these

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Rather than counting the shalls and mays, the appropriate approach is to examine the entire statute, its purposes, and its legislative history in order to determine the intent of Congress.[32] It seems irrefutable, given the legislative history set forth in Part I of this Brief, that Congress intended to compel the Secretary to pay operating subsidies, and ". . . the overall thrust of [the] statute is not optional." *Dubose v. Hills, supra,* 405 F.Supp., at 1283.

There are good reasons why Congress used different language in the deep subsidy and operating subsidy provisions of Section 236. The difference reflects the fact there are no determinations for the Secretary to make prior to the payment of deep subsidies. Since deep subsidies are to be paid to 20% of the tenants in all newly constructed Section 236 projects, Congress simply said that the Secretary "shall" make these payments. On the other hand, before operating subsidies can be paid the Secretary must make initial determinations on eligibility (*e.g.*, set initial operating expense levels and determine whether costs of taxes and utilities

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prerequisites is required by the plain language of Section 236. "For each project there *shall* be established an initial operating expense level. . . ." 12 U.S.C. §1715z-1(f)(3). (Emphasis added). "The project owner *shall,* as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges *shall* be credited to a reserve fund to be used by the Secretary to make additional assistance payments . . . ." 12 U.S.C. §1715z-1(g). (Emphasis added).

[32]This Court has recently held that "[i]n expounding a statute we must not be guided by a single sentence or member of a sentence, but must look to the provisions of the whole law, and its object and policy. . . ." *Philbrook v. Glodgett,* 421 U.S. 707, 713 (1975) (citations omitted). The Secretary's statutory authority under Section 236 cannot therefore include the power to defeat the overall purposes of the Section 236 program or its operating subsidy provisions.

have increased above those levels) and must exercise her judgment to determine whether the increases in utilities and property taxes are reasonable and comparable,[33] *i.e.*, whether the increased costs are due to poor management.

> While anxious to deal with [the problem of increased costs], the Committee also of course desired to develop a provision which would focus upon the real problem cases, and could be tightly administered, and would not simply reward poor management. . . . S. Rep. No. 93-693, 93rd Cong. 2d Sess. (1974); rptd. at 3 U.S. Code, Cong. & Admin. News 4273, 4303 (1974).

Thus, Congress directed the Secretary to make the necessary initial determinations and then authorized her to pay operating subsidies only to those projects which she had found met the statutory criteria. Both the operating and deep subsidy programs are mandatory in nature, but Congress has, in the statutory provisions, vested narrow discretion in the Secretary to determine which tenants and project owners are qualified to receive the very substantial benefits which operating subsidies would provide. The difference in language between the two provisions is, therefore, without significance. Both are equally mandatory.

2. The Secretary Cannot Lawfully Refuse to Allocate Any Contract Authority for Operating Subsidies.

The Secretary has also made a series of arguments which are premised on her assertion that she can only

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[33]Additional assistance payments shall be made only if the Secretary finds that the increase in the cost of utilities or local property taxes is reasonable and is comparable to cost increases affecting other rental projects in the community. 12 U.S.C. §1715z-1(f)(3).

pay operating subsidies through the use of contract authority and that her contract authority would be better used for other purposes. She argues that she has only a limited amount of contract authority and that Congress would prefer her to use it for the production subsidy (the interest reduction program) and for deep subsidies. Assuming for the purpose of argument that the Secretary can only make operating subsidy payments by using contract authority, her allocation of all contract authority to those other programs and none to operating subsidies is unsupportable and contrary to Congressional intent.

The Secretary claims that her decision to prefer the production subsidy is reasonable. Yet, a previous Secretary of HUD decided, after an exhaustive study, that the production subsidy program was counterproductive in operation and the United States Court of Appeals for the District of Columbia Circuit found that Congress had concurred in that decision. *Commonwealth of Pennsylvania v. Lynn, supra.* It defies reason to assert that the Secretary is rationally using her discretion to allocate limited contract authority when she allocates the bulk of it to the interest reduction program, which has been found defective and unworkable,[34] and none of it to the operating subsidy program, which Congress designed to improve and salvage the interest reduction program.

The Secretary attempts to justify her decision to use contract authority for the production subsidy by attributing to Congress a preference, which in fact

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[34]Given the default rates shown by HUD's own studies cited in footnote 14 *supra,* it is incredible that HUD should contend it is reasonable to continue to prefer to construct new projects which are doomed to fail rather than to subsidize and save existing projects.

is nonexistent, for building new projects. The Secretary cannot twist Congressional reprimands of HUD for its failure to use Section 236 contract authority promptly and Congressional directions to meet the housing needs of low income people, such as those contained in S. Rep. Nos. 93-1139, 93rd Cong. 2d Sess. (1974) and 93-1255, 93rd Cong. 2d Sess. (1974), into a mandate to emphasize housing production and ignore operating subsidies. The housing needs of poor people are not met by the production of new housing projects which are destined for ultimate failure and which those people cannot afford because rents are excessive due to escalating, unsubsidized operating costs.

The irrationality of the Secretary's position is underscored by the Congressional debates which preceded the recent re-enactment of the operating subsidy program. Representative Badillo said:

> It makes no sense for us to provide for additional construction if we are going to stand by and find that project after project throughout the States ends up in financial difficulty. . . . 123 Cong. Rec. H 4287 (daily ed. May 11, 1977).

Representative Hanley expressed agreement:

> Is it not a little ridiculous to let projects deteriorate, let them become unfit for occupancy and at the same time go out and construct brand new units of housing.
>
> . . . Again, I think it is utter nonsense if we spend a dollar in the way of new construction while on the other hand we let existing projects, where the capital investment is already made, bite the dust. That does not make sense at all. 123 Cong. Rec. H 4286-87 (daily ed. May 11, 1977).

The second part of the Secretary's argument that there is insufficient Section 236 contract authority for the operating subsidy program is that she must pay mandatory deep subsidies rather than operating subsidies. In the first place, even if there were insufficient funds to pay all mandatory deep subsidies and to pay operating subsidies, some allocation of funds between the two programs should be made. But in fact the Secretary is not preferring only mandatory deep subsidies. She is using a substantial portion of her available contract authority for deep subsidies not sanctioned by Congress.

The deep subsidy program was designed to subsidize rents for 20% of the tenants in Section 236 projects constructed *after* August 22, 1974. The Secretary admitted in affidavits filed in the District Courts below that she intended to use $2.9 million of her contract authority for projects which were constructed *prior* to August 22, 1974. J.A. 37-38. In a later affidavit filed in *Underwood v. Hills,* the amount allocated to such unauthorized deep subsidies was $6.8 million, which was more than half of the total amount allocated for all deep subsidies. *See* Exhibit A attached hereto. In her brief to this Court the Secretary implies that all deep subsidies are mandatory and that she will spend $50 million on deep subsidies. But if she maintains the same ratio between unauthorized and mandatory deep subsidies, she will be allocating approximately $25 million in contract authority to an unauthorized program while refusing to pay mandatory operating subsidies.

There is a telling inconsistency in the statements of HUD officials about inadequacy of available contract authority; since those officials have made contradictory assertions before Congress and the courts.

First, HUD has contended in this Court and in all of the lower courts which have considered this issue that it needs more contract authority if it is to pay operating subsidies, and that Congress' failure to release additional contract authority indicates its approval of HUD's refusal to pay those subsidies. Yet the former Secretary of HUD told Congress in 1976 that she was paying operating subsidies and that "No additional contract authority is required in this [Section 236] program."[35] Additionally, HUD asserted before the courts below that as of December, 1975 it needed all of the Section 236 contract authority to fund the interest reduction and deep subsidy programs. J.A. 32-42. But only three months later, the former Secretary of HUD reported to the Congress that she had an unobligated balance of $23 million in contract authority because of the cancellation or disapproval of projects which were not feasible.[36] Thus, one could not reasonably conclude that Congress, by failing to release additional contract authority, has knowingly validated the Secretary's refusal to pay operating subsidies.

3. Section 8 Is Not an Adequate Substitute for the Operating Subsidy Program.

The Secretary has also contended that implementation of the Section 8 program in financially distressed Section 236 projects has obviated the need to implement the operating subsidy program. Petitioners' Brief, at 23 n. 22.

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[35]*See* Department of Housing and Urban Development—Independent Agencies Appropriations For 1977: Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, 94th Cong. 2nd Sess., Part 6: Department of Housing and Urban Development, at 351. Several pages of this report are attached hereto as Exhibit B.

[36]*Id.*, at 352.

But the Section 8 program which provides financial assistance on behalf of lower-income families in the form of rental subsidies of four separate types—"set aside," and existing, newly constructed, or substantially rehabilitated housing,[37] is a wholly inadequate substitute for operating subsidies.[38] Obviously, if tenants and project owners had been receiving Section 8 assistance, there would have been no need for them to repeatedly sue HUD to compel payment of operating subsidies in an effort to obtain relief from the crushing burden of escalating utility and tax costs.

Under the Section 8 set aside program, which is designed to help only financially troubled projects which are HUD-insured or HUD-held, 100% of the units in a project may be assisted. However, set aside contract authority is made available to HUD area offices, which must determine that the infusion of Section 8 assistance will solve a project's cash flow problems and provide assurance of long term project viability before such assistance can be granted. There is no assurance that any given project, even if it satisfies all conditions precedent, will receive asistance under the Section 8 set aside program. More importantly,

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[37]Section 201(a) of the Housing and Community Development Act of 1974, 42 U.S.C. §1437(f).

[38]In his recent report to the Congress the Comptroller General of the United States criticized HUD's implementation of the Section 8 program and concluded that it has not provided housing to the number of low-income persons and stimulated the number of new housing starts originally anticipated. Report to the Congress by the Comptroller General, "Major Changes are Needed in the New Leased Housing Program," No. CED-77-19 (Jan. 28, 1977). Specifically, the Comptroller General found that HUD's implementation of the various Section 8 programs was too long delayed, that complex regulations and forms deterred participation by private landlords, and that the set aside program would not provide the same benefits as would the operating subsidy program. *Id.*, at 31, 33-34, and 50-53.

Section 8 set aside assistance has been made available for only 111,000 units in all HUD-insured or HUD-held multi-family projects. 24 C.F.R. §886 *et seq.* All of those units have been allocated (*See* Petitioners' Brief at 23 n. 22), and the Secretary consequently has no more Section 8 set aside funds with which to assist the 232,000 tenant families which she estimates are eligible for operating subsidies.

With respect to Section 8 housing assistance for existing units, Section 2(b)(1) of Pub. L. No. 94-375, "The Housing Authorization Act of 1976," provides that HUD's allocation of contract authority for Section 8 must conform, to the maximum extent practicable, to the Housing Assistance Plan (HAP) submitted by each locality to identify that community's needs for Section 8 assistance. HUD cannot allocate contract authority based on its own independent assessments of need.

Moreover, HUD regulations, 24 C.F.R. §882.110(c)(2), provide that rental subsidy payments for rent supplements, deep subsidies, Section 8 for existing housing, and state or local subsidies may not be made to more than 40% of the total number of units in each Section 236 project unless approved by the Regional Administrator in hardship cases. Consequently, at most only a fraction of the low-income tenants qualified for operating subsidies could be aided by these Section 8 subsidies.

Therefore, even proper and complete implementation of the Section 8 program would not obviate the need for the Section 236 operating subsidies mandated by Congress. The Secretary's substitution of her judgment for that of Congress and her preference for another subsidy program which provides no relief for the great

majority of Section 236 tenants has had a severely detrimental effect on the low-income tenants for which the Section 236 program and the operating subsidy provisions were designed.

4. The Operating Subsidy Program Would Substantially Benefit Tenants Without Unduly Burdening HUD or Project Owners.

The Secretary's final argument, which she asserted for the first time in her stay application to this Court in *Hills v. Underwood,* No. A-259, O.T. 1976, is that she reasonably decided not to implement the operating subsidy program because it would be administratively inefficient and of minimal benefit to tenants. Putting aside for the moment the merits of the Secretary's claim that the operating subsidy program is inefficient, this Court should consider the timing of her raising of the claim of inefficiency. If that were indeed her reason for not implementing the program it is incomprehensible that she did not present it in the District Courts below. The inference is plain that she created this rationale after the fact. Such *post hoc* rationalizations should be given no weight. *See, e.g., Continental Air Lines, Inc. v. C.A.B.,* 551 F.2d 1293, 1311 n. 81 (D.C. Cir. 1977), in which the Court declared:

> "Of course, on review, we must look at the findings, policies, and explanations made by the agency itself, rather than *post hoc* rationalization of counsel."[39]

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[39]The sound reasons behind this policy were expressed by Judge Adams in *American Iron and Steel Institute v. E.P.A.,* 526 F.2d 1027 (3d Cir. 1975):

> As a general principle, moreover, it is disturbing that courts should consider subsequently developed information

Moreover, the Secretary of HUD, in the only document which she has to support her claim that the operating subsidy program would be excessively costly to administer, greatly exaggerates the dimensions of the administrative burden imposed on HUD and project owners.[40] For example, she asserts that constant recalculations of increases in costs and utilities and of tenants' incomes are necessary. This assertion is contradicted by the Secretary's own draft instructions to project owners which require such recalculations only when rents are increased or when project owners who had included utilities in their rents change their policy and require tenants to procure and pay for their own utilities. *See* draft Operating Subsidy Handbook pp. 9-10, which pages are attached hereto in Exhibit

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to determine whether an administrative decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." To entertain such information may encourage the use of the courts as mere extensions of a continuous administrative process. It may also encourage some administrators to issue decisions that may well be arbitrary at the time of promulgation hoping like Micawber that "something will turn up." Neither of these consequences would appear to enhance the efficiency of the courts or the confidence of citizens in the fairness of the administrative process. 526 F.2d, at 1077 n. 22.

See also Securities and Exchange Commission v. Chenery, 318 U.S. 80 (1943), on which both Judge Adams and the Court in *Continental Air Lines v. C.A.B.* relied.

[40]The Court should note that because this document (the Affidavit of Fred W. Pfaender submitted as Appendix G in support of the Stay Application in *Hills v. Underwood, supra*) and the facts and figures contained in it were never presented to the District Courts below and appeared after the decisions of those courts had already been rendered, tenants have had no opportunity to do any discovery to determine the basis for or accuracy of those figures. For this additional reason, this Court should accord these claims no weight. Furthermore, there is good reason to believe that the operating subsidy program, in operation, is as efficient as any other federal housing program. *See* Affidavit of William M. Kargman, filed in support of Plaintiff's Application to Vacate Stay in *Underwood v. Harris.*

C. In addition, the information required by the Secretary for implementation of the operating subsidy program is already available to HUD on forms designed for other purposes. For example, *see* p. 14 of the draft handbook, portions of which are included in Exhibit C, in which HUD directs project owners to transcribe tenants' rents from other forms already submitted to HUD for other purposes.

It is absolutely irrational for HUD to assert that this subsidy is onerous for project owners when project owners are among those suing HUD to compel payment of operating subsidies.[41] Moreover, any costs incurred by project owners will be passed on to tenants. Even so, tenants would receive substantial benefits from operating subsidies, despite the Secretary's suggestion to the contrary. HUD estimated in September, 1976 that the median maximum monthly operating subsidy per unit would be $15.43,[42] less administrative costs. HUD's estimates of those administrative costs have varied wildly.[43]

In June, 1976, HUD estimated[44] that payment of operating subsidies would consume $803,900 in staff

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[41]*Battles Farm Co. v. Hills, supra,* was a suit brought by the owners of four Section 236 projects in Massachusetts; *See also Taunton Gardens Co. v. Hills,* 421 F.Supp. 524 (D. Mass. 1976), *aff'd* 557 F.2d 877 (1st Cir. 1977).

[42]*See* para. 3 of the Affidavit of Fred W. Pfaender, Director, HUD Office of Loan Management, dated September 27, 1976, attached as Appendix G to the Stay Application in *Hills v. Underwood, supra.*

[43]In fact, there is reason to believe that monthly operating subsidies to each tenant will be far greater and administrative costs must less than HUD estimates. *See* para. 3 of the Affidavit of William M. Kargman filed in support of Plaintiff's Application to Vacate Stay in *Underwood v. Harris.*

[44]Affidavit of James J. Tahash in *Underwood v. Hills,* dated June 17, 1976 and filed in the United States Court of Appeals for the District of Columbia Circuit as Add. M-

costs to project owners, which would result in a rent increase of $2.38 a unit each year, that is, $0.18 a month. However, by September, 1976, HUD's estimated costs to project owners had increased to $1,050,300 in staff costs plus $9.65 million in "additional costs" for such overhead expenses as "bookkeeping systems, tenant files, efforts to locate eligible tenants . . . [and] increased auditing costs and management fees."[45] Even accepting these highly questionable figures, tenants would still be receiving a total operating subsidy of $66.2 million[46] at a cost of $10.7 million, a net gain of approximately $55 million. Those costs do not "substantially offset any benefit tenants might otherwise experience from payment of the subsidy", as HUD claims. Petitioners' Brief, at 24.

But even if the operating subsidy program were inefficient, it is not the Secretary's prerogative to refuse to enforce the law.

> . . . [N]owhere does our Constitution extol the virtue of efficiency and nowhere does it command that all our laws be fiscally wise. It does most clearly, however, state that laws, good or bad, be enacted by the Congress and enforced by the President. *Guadamuz v. Ash, supra,* 368 F.Supp., at 1243.

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lm to the Motion of the Federal Defendants-Appellants for a Stay Pending Appeal, a portion of which is attached hereto as Exhibit D.

[45]*See* para. 6 of the Affidavit of Fred W. Pfaender, dated September 27, 1976 which was filed in this Court in support of the Stay Application in *Hills v. Underwood.*

[46]*See* para. 3 of the Affidavit of Fred W. Pfaender, estimating that $66.2 million would be the amount of operating subsidies due tenants for the period February 18, 1975 through August, 1976.

III.
THESE CASES NO LONGER WARRANT REVIEW BY THIS COURT.

The single issue presented in each of these cases is the same—"[w]hether 12 U.S.C. (Supp. V) 1715z-1(f)(3) requires the Secretary of Housing and Urban Development to establish and implement an operating subsidy program." *Abrams* Pet., at 2; *Ross* Pet., at 2; Petitioners' Brief, at 2. This Court granted the petitions for writs of certiorari and consolidated these cases on May 23, 1977.[47]

Amici now urge this Court to dismiss the petitions for writs of certiorari as improvidently granted pursuant to Supreme Court Rules 19(1)(b), 25 and 60. The construction of the operating subsidy provisions of the Housing and Community Development Act of 1974 is no longer of significance because of their amendment in Section 206 of Pub. L. No. 95-128. The enactment of the operating subsidy provisions of the Housing and Community Development Act of 1977 ensures that the issue raised by Petitioners will never arise again.[48] Furthermore, since these amendments make it indisputable that implementation of the operating subsidy program is mandatory effective October 1, 1977 and that the excess rental reserve fund can be expended directly without the use of the Secretary's Section 236 contract authority,[49] a decision by this Court in the

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[47]*Harris v. Ross*, No. 76-1234, *cert. granted* ..... U.S. ....., 97 S.Ct. 2630; *Harris v. Abrams*, No. 76-1261, *cert. granted* ..... U.S. ....., 97 S.Ct. 2630.

[48]Significantly, in *Ross* the judgment subject to review ordered the Secretary to implement the program prospectively and all operating subsidy payments have been made. The judgment in *Abrams* concerns only a six month claim for retroactive operating subsidies to tenants in a single Section 236 project now receiving housing assistance payments under the Section 8 program.

[49]*See* argument *supra* in text accompanying footnotes 8-19 and 21-22.

Ross and *Abrams* cases would be of no precedential value.

Thus these cases no longer pose a continuing issue of national housing policy or an important question of federal law. This Court's decision in *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955), compels dismissal of the writs as the proper course in these circumstances. In *Rice* the issue was whether a privately owned cemetery could properly defend a suit for breach of a burial contract because the decedent was a Winnebago Indian and the contract restricted burial privileges to Caucasians. Following consideration of a petition for hearing,[50] the Court was informed of the passage of a new Iowa statute which settled the issue prospectively although it afforded the petitioner in *Rice* no relief. Speaking through Mr. Justice Frankfurter, this Court declared:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such cases. Nor does it sit for the benefit of the particular litigants. *Rice, supra*, 349 U.S., at 74.

Accordingly the petition for rehearing in *Rice* was granted and the writ, previously granted, was dismissed.[51] *See also District of Columbia v. Sweeney*,

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[50]The lower court's decision was initially affirmed by an equally divided Court. 349 U.S. at 73, citing 348 U.S. 880.

[51]In *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), Mr. Chief Justice Taft explained the reasons underlying Rule 19:

> . . . [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . .

310 U.S. 631 (1940), where certiorari was denied "in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance."

Ross and *Abrams* no longer present an issue of national housing policy or of federal law which it is necessary for this Court to decide pursuant to Rule 19 of the Supreme Court Rules, and involvement of this Court in these cases is consequently no longer warranted.

CONCLUSION.

The Secretary of HUD has a mandatory duty to make operating subsidy payments on behalf of low-income tenants and has unlawfully refused to do so. Therefore, should this Court decide these cases on the merits, it should affirm the judgments of the courts of appeal.

Respectfully submitted,

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